and I hold that the shop was "used for human habitation".

Mr. Hastings relied also on an allegation that the shop is unfit for human habitation. By any good standards of housing requirements, it probably is so: but it has been inspected by the authorities, and they have not seen fit to condemn it, or otherwise to prevent its being used for human habitation. Such user may be socially undesirable, but it is not unlawful, and nothing less than that would affect the situation.

Reverting to the first of the three grounds on which it is sought to bring the shop within the definition of premises, the submission that it was "any ....other building used for human habitation". For the purpose of this definition, I think a structure, whether or not one would ordinarily think of it as a unit, and in that sense a "building", can be a "building". One would normally consider the shop to be part of a building — part, in fact, of a shop-house — but I think it is also itself a "building" within the definition. On this ground also I think the shop is within the definition of "premises", under the Control of Rent Ordinance, 1948.

I would allow this appeal.

Appeal Allowed.

PUBLIC PROSECUTOR v. LEE SIN LONG.

[App. Crim. Juris. (Callow, J.) August 9, 1948]

[Malacca — Crim. App. No. 5 1948]

Common Gaming Houses Ordinance (Cap. 30) Ss. 9, 12 — Necessity for Search Warrant — Whether presumptions under s. 9 are dependent upon compliance with s. 12.

In this case the Public Prosecutor appealed against the decision of the learned Magistrate, who held that there was no case to answer, on the following grounds:—

(a) that the learned Magistrate misdirected himself in holding that the arrest and search was not carried out as required by Section 12 of the Common Gaming Houses Ordinance (Cap. 30) as amended by Section 5 of Ordinance No. 31 of 19[illegible].

(b) that the learned Magistrate, having held that the prosecution had satisfied him that **Chap Ji Ki** Lotteries and **Whah Weh** Lotteries are games of chance, should have held that the presumption under Section 9 of Cap. 30 arose against the Respondent.

It was argued in this case that unless the requirements of Section 12 of the Common Gaming Houses Ordinance as to arrest and search were fully satisfied, no presumption can arise in accordance with S. 9 of the Ordinance.

Held, (1) that Section 12 of the Common Gaming Houses Ordinance requires the provision of a warrant before there can be interference with the liberty of an individual against whom no offence within Section 30 of the Criminal Procedure Code is alleged; (2) that the presumptions in Section 9 of the Ordinance (Cap. 30) are not dependent upon compliance with Section 12 of the same Ordinance. If a person is found and prosecuted for contravention of Section 9, then he cannot evade the presumption against him by pleading non-fulfilment of Section 12 which is only to assist in apprehension and to sanction search.

Cases referred to:—

(1) *R. v. Sujjad Ali,* 3 N.W.P. 134.

(2) *Nazir Khan v. Proladh Dutta & Ors.,* I.L.R. IV Ca. 659.

(3) *Saminathan v. Public Prosecutor,* (1937) M.L.J. 39.

(4) *R. v. Carr-Briant,* (1943) 2 All E.R. 156.

MAGISTRATE'S APPEAL.

C. V. Boyle, D.P.P., for Public Prosecutor.

W. H. Salt for the Respondent.

Callow, J. : — This is an appeal by the Public Prosecutor against the acquittal by the Magistrate, Malacca, on the 17th of April, 1948.

The charges were as follows:—

1. That you on or about 11/3/48 at 4.20 p.m. at Lorong Panjang did assist in carrying on a public lottery, to wit, **Chap Ji Ki** and have thereby committed an offence punishable under Section 4(c) Cap. 30.

2. That you on or about 11/3/48 at 4.20 p.m. at Lorong Panjang did assist in the carrying on a public lottery, to wit, **Whah Weh** and have thereby committed an offence punishable under Section 4(c) Cap. 30.

The learned Magistrate held that there was no case to answer, and the appellant is dissatisfied on the following grounds:—

(a) The learned Magistrate misdirected himself in holding that the arrest and search was not carried out as required by Section 12 of the Common Gaming Houses Ordinance (Cap. 30) as amended by Section 5 of Ordinance No. 31 of 1939.

(b) The learned Magistrate, having held that the prosecution had satisfied him that **Chap Ji Ki** Lotteries and **Whah Weh** Lotteries are games of chance the learned Magistrate should have held that the presumption under Section 9 of Cap. 30 arose against the Respondent.

As the argument progressed it seemed that the grounds filed did not clearly disclose the real point at issue. It is that unless the requirements of section 12 of the Common Gaming Houses Ordinance as to arrest and search are fully satisfied, no presumption can arise in accordance with section 9 of the Ordinance.

Mr. Salt, for the respondent, argued by analogy with section 11 of the Ordinance. He cited authorities and extracts from Common Gaming Houses by *Braddell* (2nd edition pages 37 *et seq*) to show that in regard

to premises there must be full compliance with the Ordinance before presumptions may arise.

Mr. Salt quoted in particular *R. v. Sujjad Ali*[1] and *Nazir Khan v. Proladh Dutta & ors.*[2], stating that the latter case contained the kernel of his argument. Unfortunately the first mentioned report is not in the Library, but I have had the opportunity of reading *Nazir Khan's* case[2].

These cases, and all those referred to in the relevant pages of *Braddell*, concern the search of premises — not the person. They illustrate the proposition that the presumptions contained in sections 6(2), 14 and 15(1) of the Ordinance can only operate when premises have been entered under the Ordinance (*Braddell*, 2nd edition page 40).

The facts of this case are simple. The Police, by virtue of section 12 of the Ordinance, obtained a warrant (Ex. P1). On meeting the accused he was stopped, and Police Corporal Yusoff bin Osman asked him if he had any *Chap Ji Ki* slips. Thereupon the accused produced Ex. P2, and there is evidence, though no specific finding appears, that this slip (Ex. P2) is used in the collection of stakes; Detective Sergeant Lee Ee Miow (4 P.W.) said "The possessor of P2 is a collector" (Record, page 6).

Now section 12 of the Ordinance gives authority by warrant to arrest and search. There is some conflict of evidence as to arrest. The procedure envisaged by section 12 is for formal arrest, followed by search. There is evidence at page 3 of the record that the officer did arrest the accused, but as the incriminating slip was there and then produced, no necessity for search arose.

Mr. Salt's argument is that because no presumption under sections 6(2), 14 and 15(1) can arise unless section 11 is fully satisfied, therefore absence of search as provided for in section 12 prohibits the operation of the presumption in section 9. Clearly the officer had no occasion to search the person of the accused, for he had already obtained his evidence in the slip (Ex. P2).

There is no contention as to the jurisdiction of the Court below on account of this absence of search. Indeed, even had illegalities or irregularities occurred in arrest, the jurisdiction would not have been affected. The issue here is whether the presumption in section 9 should arise, it having been admitted that the officer in whose name the warrant (Ex. P1) issued, did not search the accused. The learned Magistrate held that failure to comply strictly with section 12 prevented recognition of the presumption in section 9, and so found the accused had no case to answer.

It would seem that the primary object of the Ordinance was the suppression of public gaming houses. The onset on the individual outside such houses developed later.

It is quite understandable how the stipulations for and requisites of search became enacted. The privacy of a person in his home must be respected, and cannot be disturbed unless first shown to proper authority that reasonable cause for interference is warranted. Without a warrant the householder might be justified in refusing admission to a police officer.

But, however, if entry is gained without a warrant, or accompanied by any other illegality, or in any other manner not under the Ordinance, then subsequent procedure does not vitiate a verdict, although presumptions under section 6(2), 14 or 15(1) are estopped because entry has not been in accordance with the provisions of the Ordinance, and thus the whole burden of proof is placed upon the prosecution.

It seems quite obvious that this proposition of law arises because sections 6(2), 14 and 15(1) contain the phrase "entered under this Ordinance". In each section the presumption only operates if entry is proved to have been in accordance with the provisions of the Ordinance.

In section 9 there is no such term. Section 12 provides for the arrest and search of a suspected person, for otherwise apprehension might be impossible. Mr. Salt made the startling assertion that, as the law now stands, a person can with impunity perambulate the streets of Malacca carrying quite openly in his hand a number of *Chap Ji Ki* tickets. It certainly seems arguable that without a warrant he cannot be arrested, but it is wiser to confine this judgment to the particular case before the Court.

Both Counsel referred to the case of *Saminathan v. Public Prosecutor*[3]. In that case it was held that the legality or illegality of arrest does not concern the trial Court, but the pertinent point is the disregard of the presumption referred to in section 10 of the Betting Ordinance. Now section 10 follows sections 6(2), 14 and 15(1) of the Common Gaming Houses Ordinance and contains the words "entered under this Ordinance" and "authority under this Ordinance". In *Saminathan's* case[3] it was found that the search and entry of the accused's room was illegal and thus not under the Ordinance; therefore the presumption under section 10 could not operate.

In the case now before this Court the only apparent omission is the unnecessary commission of search. Even if section 9 had contained an expression capable of interpretation requiring full proof of search before the presumption could be involved I think it would be stretching law to an absurdity to hold that because a search for which authority had been obtained was not conducted as there was no need for it, therefore the presumption in section 9 could not be regarded.

In my view section 12 simply requires the provision of a warrant before there can be interference with the liberty of an individual against whom no offence within section 30 of the Criminal Procedure Code is alleged.

I rule that the presumptions in section 9 of the Ordinance (Cap. 30) are not dependent upon compliance with section 12 of the same Ordinance. That section provides for arrest and search. If a person is found and prosecuted for contravention of section 9, then he cannot evade the presumption against him by pleading non-fulfilment of section 12 which is only to assist in apprehension and to sanction search.

I need hardly add that although a presumption may arise it is rebuttable. What is sufficient evidence to rebut and thus throw the burden of proof back on to the prosecution is matter for judicial decision in each case. It is certainly not as high as that demanded from the prosecution in proof of a charge, and if the accused can show a probability in his favour it is enough (*R. v. Carr-Briant*[4]).

The appeal is upheld. The judgment of the Court below is set aside, and the case is remitted with the direction that the presumptions contained in section 9 of the Ordinance are applicable; that is to say, provided the Court is satisfied as to the proof in respect of the other ingredients of the charge, the accused should be called upon for his defence. The prosecution should be given liberty to re-open their case on application.

Appeal Allowed.